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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 JOSHUA C. BRANT,
10 Plaintiff,

11 v.
12 CAROLYN W. COLVIN, Acting
13 Commissioner of Social Security,
14 Defendant.

NO. CV-11-184-RHW

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

14 Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 13
15 and Defendant's Motion for Summary Judgment, ECF No. 15. The motions were
16 heard without oral argument. Plaintiff is represented by Lora Lee Stover.
17 Defendant¹ is represented by Assistant United States Attorney Pamela De Rusha
18 and Special Assistant United States Attorney Jeffrey McClain.

19 I. **Jurisdiction**

20 On May 27, 2008, Plaintiff Joshua C. Brant filed an application for
21 Supplemental Social Security Income (SSI). Plaintiff alleges that he has been
22 disabled since March 1, 1997.

24 1Carolyn W. Colvin became the Acting Commissioner of Social Security on
25 February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure,
26 Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this
27 suit. No further action need be taken to continue this suit by reason of the last
28 sentence of 42 U.S.C. § 405(g).

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1 His application was denied initially on August 6, 2008, and again denied on
 2 reconsideration on October 1, 2008. A timely request for a hearing was made. On
 3 October 8, 2009, Plaintiff appeared in Spokane, Washington before Administrative
 4 Law Judge (ALJ) R.S. Chester. W. Scott Mabee, Ph.D, medical expert, and Scott
 5 A. Whitmer, vocational expert, also appeared at the hearing. Plaintiff was
 6 represented by attorney Lora Lee Stover.

7 The ALJ found that Plaintiff was not disabled since May 27, 2008, the date
 8 the application was filed. Plaintiff timely requested review by the Appeals
 9 Council, which was denied March 24, 2011. The Appeals Council's denial of
 10 review makes the ALJ's decision the final decision of the Commissioner. (42
 11 U.S.C. §405(h)). Plaintiff filed an appeal with the U.S. District Court for the
 12 Eastern District of Washington on May 10, 2011. The instant matter is before the
 13 district court pursuant to 42 U.S.C. § 405(g).

14 **II. Sequential Evaluation Process**

15 The Social Security Act defines disability as the "inability to engage in any
 16 substantial gainful activity by reason of any medically determinable physical or
 17 mental impairment which can be expected to result in death or which has lasted or
 18 can be expected to last for a continuous period of not less than twelve months."
 19 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
 20 under a disability only if his impairments are of such severity that the claimant is
 21 not only unable to do his previous work, but cannot, considering claimant's age,
 22 education and work experiences, engage in any other substantial gainful work
 23 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

24 The Commissioner has established a five-step sequential evaluation process
 25 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),
 26 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

27 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
 28 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and

1 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
 2 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
 3 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
 4 416.920(b). If he is not, the ALJ proceeds to step two.

5 Step 2: Does the claimant have a medically-severe impairment or
 6 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
 7 claimant does not have a severe impairment or combination of impairments, the
 8 disability claim is denied. A severe impairment is one that lasted or must be
 9 expected to last for at least 12 months and must be proven through objective
 10 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is
 11 severe, the evaluation proceeds to the third step.

12 Step 3: Does the claimant's impairment meet or equal one of the listed
 13 impairments acknowledged by the Commissioner to be so severe as to preclude
 14 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
 15 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
 16 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
 17 impairment is not one conclusively presumed to be disabling, the evaluation
 18 proceeds to the fourth step.

19 Step 4: Does the impairment prevent the claimant from performing work he
 20 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
 21 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
 22 perform this work, the ALJ proceeds to the fifth and final step.

23 Step 5: Is the claimant able to perform other work in the national economy
 24 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),
 25 416.920(f).

26 The initial burden of proof rests upon the claimant to establish a *prima facie*
 27 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
 28 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or

1 mental impairment prevents him from engaging in his previous occupation. *Id.* At
 2 step five, the burden shifts to the Commissioner to show that the claimant can
 3 perform other substantial gainful activity. *Id.*

4 **III. Standard of Review**

5 The Commissioner's determination will be set aside only when the ALJ's
 6 findings are based on legal error or are not supported by substantial evidence in
 7 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
 8 (citing 42 .S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
 9 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
 10 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
 11 evidence is "such relevant evidence as a reasonable mind might accept as adequate
 12 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
 13 ALJ's denial of benefits if the evidence is susceptible to more than one rational
 14 interpretation, one of which supports the decision of the administrative law judge.
 15 *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the
 16 evidence can support either outcome, the court may not substitute its judgment for
 17 that of the ALJ." *Matney*, 981 F.2d at 1019.

18 A decision supported by substantial evidence will be set aside if the proper
 19 legal standards were not applied in weighing the evidence and making the
 20 decision. *Brawner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
 21 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
 22 immaterial to the ultimate non-disability determination. *Stout v. Comm'r, Soc. Sec.*
 23 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

24 **IV. Statement of Facts**

25 The facts have been presented in the administrative transcript and the ALJ's
 26 decision, and will only be summarized here.

27 At the time of the hearing, Plaintiff was 20 years old. He has an 8th grade
 28 education. He has difficulty in school and was kicked out of at least three schools

1 for fighting with students and teachers. He was also kicked out of Job Corps. He
2 had two short-term employments, but he was fired from both. He has spent time in
3 juvenile detention because of his fighting. He has had physical altercations with
4 his family members. He does not have a drivers license, rather, his mother drives
5 him to his appointments. He helps his mother with the shopping, and can do
6 housework. He does not use public transportation because he does not like to be
7 around other people.

8 **V. The ALJ's findings**

9 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
10 activity since May 27, 2008, the application date. (Tr. 25.)

11 At step two, the ALJ found Plaintiff had the following severe impairments:
12 antisocial conduct, intermittent explosive disorder, attention deficit hyperactivity
13 disorder and asthma. (Tr. 25.)

14 At step three, the ALJ found Plaintiff did not have an impairment or
15 combination of impairments that meets or medically equals one of the listed
16 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Tr. 27.)

17 At step four, the ALJ found that Plaintiff has the residual functional
18 capacity to perform a full range of work at all exertional levels, but with the
19 following nonexertional limitations: avoid concentrated exposure to fumes, odors,
20 and dust; capable of simple one- to three-step tasks as well as complex tasks; and
21 superficial contact with the public and coworkers. (Tr. 31.) He found Plaintiff had
22 no past relevant work. (Tr. 32.)

23 At step five, the ALJ considered Plaintiff's age, education, work experience,
24 and residual functional capacity and found there are jobs that exist in significant
25 numbers in the national economy that Plaintiff can perform. Specifically, the ALJ
26 found that Plaintiff can perform the jobs of assembler, linen grader, and bakery
27 racker. (Tr. 32.)

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1 **VI. Issues for Review**

2 Plaintiff presents the following issues with respect to the ALJ's findings:

- 3 1. The ALJ erred in disregarding the medical expert's testimony and the
 4 reviewing DDS psychologist's assessment of limitations;
- 5 2. The ALJ erred in assessing Plaintiff's residual functional capacities;
- 6 3. The ALJ failed to pose a proper hypothetical to the vocational expert;
- 7 4. The evidence taken from the record as a whole does not support the
 8 ALJ's decision that Plaintiff is not disabled.

9 **VII. Discussion**

10 The underlying issue in Plaintiff's appeal is whether the ALJ erred in
 11 finding that Plaintiff is not limited in interacting with his supervisors. Rather than
 12 crediting Dr. Mabee and Dr. Kraft's opinion on this issue, the ALJ concluded that
 13 Plaintiff would be able to accept instructions and respond appropriately to
 14 criticism from supervisors. (Tr. 31.) Both Dr. Mabee and Dr. Kraft opined that
 15 Plaintiff had difficulty working with supervisors. At the hearing, Dr. Mabee
 16 testified:

17 I didn't complete the MSS, but basically, what I saw as the
 18 most prominent limitations would be in the area of interpersonal
 19 functioning and therefore, being able to deal with the public, dealing
 with co-workers, dealing with supervision in particular, would have at
 least moderate to marked limitations.

20 (Tr. 59.)

21 Dr. Kraft believed Plaintiff to be moderately limited in terms of his ability to
 22 accept instructions and respond appropriately to criticism from supervisors (Tr.
 23 308.) Both indicated that Plaintiff's interpersonal difficulties were at least
 24 moderate to severe.

25 In rejecting these opinions, the ALJ noted that although Plaintiff testified
 26 that he was fired from his job as a janitor in part because he had difficulties with
 27 his boss, on the functional report he stated he was fired for leaving work because
 28 he felt his job was done and he wanted to visit his father. At that time, he did not

1 give any indication that he was having difficulties with his supervisor. He also
 2 noted that a treatment note from September, 2008, when he was working at the
 3 convenience store, indicated that he was having problems with the public, not his
 4 supervisor. Consequently, the hypothetical posed by the ALJ did not include any
 5 limitations with respect to contact with a supervisor.

6 The ALJ also gave little weight to Dr. Brown's opinion that Plaintiff has
 7 moderate to severe cognitive and social limitation, noting that Dr. Mabee did not
 8 believe the record supported the severe ratings. He also relied on the fact that
 9 Plaintiff has not received any counseling as an adult and during his adolescence,
 10 he did not take counseling seriously. Finally, he noted that Plaintiff suggested
 11 there had been some improvement of his symptoms. (Tr. 31.)

12 Generally, "the opinion of an examining physician is entitled to greater
 13 weight than the opinion of a non-examining physician." *Ryan v. Comm'r of Soc.
 14 Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (internal citation and quotation omitted).
 15 In addition, if a claimant has a treatment relationship with a provider, and that
 16 provider's opinion is supported by clinical evidence and not inconsistent with the
 17 record, the provider will be given controlling weight. 20 C.F.R. § 416.927(c)(2).
 18 "To reject [the] uncontradicted opinion of a treating or examining doctor, an ALJ
 19 must state clear and convincing reasons that are supported by substantial
 20 evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (internal
 21 citation omitted). "If a treating or examining doctor's opinion is contradicted by
 22 another doctor's opinion, an ALJ may only reject it by providing specific and
 23 legitimate reasons that are supported by substantial evidence." *Id.* Furthermore, if
 24 the treating physician's opinion is conclusory, brief, and unsupported by clinical
 25 findings, an ALJ need not accept it in light of conflicting opinions. *Tonapetyan v.
 26 Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001).

27 Here, the ALJ provided specific and legitimate reasons that are supported by
 28 substantial evidence for rejecting Dr. Brown's opinions that Plaintiff's social and
 cognitive limitations are severe. On the other hand, while the ALJ provided

1 specific reasons for rejecting Dr. Mabee and Dr. Kraft's opinions, these reasons
2 are not clear and convincing, nor does substantial evidence indicate that Plaintiff
3 is able to accept instructions and respond appropriately to criticisms from
4 supervisors. Rather, the record demonstrates that Plaintiff has significant
5 interpersonal difficulties that affect his interaction with the public, co-workers,
6 and supervisors, in particular. The record shows that he has difficulties in
7 interacting with persons of authority. He was kicked out of several schools, he has
8 been in trouble with the law for fighting with the police, friends, and family
9 members, and he has not been able to sustain employment longer than one and half
10 months. He testified that he does not like people and does not like being around
11 people. As such, the ALJ erred in rejecting Dr. Mabee and Dr. Kraft's opinion that
12 Plaintiff has limitations in dealing with supervisors and failing to incorporate this
13 limitation in the Residual Functional Capacity.

14 On remand, the ALJ shall consider Dr. Mabee's and Dr. Kraft's opinions
15 regarding Plaintiff's limitations in dealing with supervisors in determining his
16 residual functional capacity.

17 Accordingly, **IT IS HEREBY ORDERED:**

- 18 1. Plaintiff's Motion for Summary Judgment, ECF 13, is **GRANTED**.
- 19 2. Defendant's Motion for Summary Judgment, ECF No. 15, is **DENIED**.
- 20 3. The decision of the Commissioner denying benefits is reversed, and
21 remanded to the ALJ for further proceedings consistent with this Order.

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4. The District Court Executive is directed to enter judgment in favor of Plaintiff and against Defendant.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order and provide copies to counsel, and **close the file**.

DATED this 5th day of March, 2012.

s/Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

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ORDER GRANT JUDGMENT; DE